

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100442
	:	TRIAL NO. B-1000142
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
CHRISTOPHER LATHAM,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Christopher Latham appeals the judgment of the Hamilton County Court of Common Pleas convicting him of robbery. He was convicted after a jury trial.

Late one evening, Timothy Sunderhaus had completed a pizza delivery when he was confronted by a man with a gun. The gunman had two companions who stood on a nearby street corner.

The gunman demanded money, and Sunderhaus gave him the \$37 he had gotten from the pizza delivery. After demanding more money, the assailant began to pull the trigger of the gun, but Sunderhaus knocked the gun away with his flashlight. The gun discharged three times, narrowly missing Sunderhaus. After the shots were fired, the three fled.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

Sunderhaus summoned the police, who arrived almost immediately. Sunderhaus described the gunman as an African-American man wearing a dark coat, dark pants and a bandana covering his lower face.

A police dog followed a trail to a residence near the location of the robbery. There, the police found Latham and two companions, as well as a firearm matching the description of the weapon used in the offense. Within 20 minutes of arriving, the police took Sunderhaus to the residence, where he identified Latham as the gunman. Forensic testing revealed that Latham had recently fired a gun.

Latham rested without presenting any evidence. The jury found him guilty, and the trial court sentenced him to eight years' imprisonment.

In his first assignment of error, Latham argues that he was deprived of the effective assistance of trial counsel. Specifically, he contends that counsel was deficient in failing to file a motion to suppress the out-of-court identification.

To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable performance and that prejudice arose from counsel's performance.²

In this case, no prejudice arose from counsel's decision not to pursue a motion to suppress the identification. To suppress identification testimony, the trial court must find that identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."³ "Reliability is the linchpin in determining the admissibility of identification

² *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

³ *Neil v. Biggers* (1972), 409 U.S. 188, 197, 93 S.Ct. 375, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967; *State v. Green* (1996), 117 Ohio App.3d 644, 652, 691 N.E.2d 316.

testimony.”⁴ Thus, even if the identification procedure was suggestive, so long as the challenged identification was reliable, it is admissible.⁵

The identification procedure in this case did not give rise to a substantial likelihood of misidentification. Sunderhaus identified Latham as the gunman approximately 20 minutes after the offense had occurred and after Latham had been apprehended in the vicinity of the offense. He had seen Latham at close proximity for a sufficient period of time to take note of his general features and his clothing. Under these circumstances, we cannot say that the identification procedure was invalid. Thus, a motion to suppress would have been futile, and Latham has failed to show any prejudice as a result of counsel’s alleged derogation of duty. We overrule the first assignment of error.

In his second and third assignments of error, Latham contends that the conviction was based on insufficient evidence and was against the manifest weight of the evidence. We address the assignments together.

In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁶ To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.⁷

⁴ *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243.

⁵ *State v. Seay*, 1st Dist. No. C090233, 2010-Ohio-896, ¶129, jurisdictional motion overruled, 126 Ohio St.3d 1514, 2010-Ohio-3331, 930 N.E.2d 332.

⁶ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

⁷ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

The robbery statute, R.C. 2911.02(A)(2), provides that “[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]”

In the case at bar, the conviction was in accordance with the evidence. Sunderhaus identified Latham as the person who had taken money from him at gunpoint. Latham was found near the scene of the robbery in a house where the weapon was also discovered, and forensic tests established that he had recently fired a gun. Although Latham points to certain alleged deficiencies in the identification testimony, we cannot say that the jury lost its way in finding him guilty.

We overrule the second and third assignments of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and FISCHER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 5, 2011
per order of the Court _____.
Presiding Judge